

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/10

Date: 8 July 2011

PRE-TRIAL CHAMBER I

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR V. CALLIXTE MBARUSHIMANA***

Public Decision

Decision on the "Defence Request for Disclosure"

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
 Ms. Fatou Bensouda, Deputy Prosecutor
 Mr. Anton Steynberg, Senior Trial
 Lawyer

Counsel for the Defence

Mr. Nicholas Kaufman
 Ms. Yael Vias-Gvirsman

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
 Victims**

**The Office of Public Counsel for the
 Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
 Section**

Other

I, Judge Cuno Tarfusser, the Single Judge of Pre-Trial Chamber I of the International Criminal Court (“Chamber” and “Court” respectively) responsible for carrying out the functions of the Chamber in relation to the case of *The Prosecutor v. Callixte Mbarushimana* in the absence of Judge Sanji Mmasenono Monageng¹;

NOTING the “Defence Request for Disclosure”² filed on 10 June 2011, whereby the Defence requested the Chamber to review and order the transmission to the Defence of a letter from the Government of the Democratic Republic of the Congo (“DRC”) to the Prosecutor (“Letter”) (“Defence Request”);

NOTING the “Order for observations on the “Defence Request for Disclosure””³ issued by the Single Judge on 15 June 2011, whereby the Prosecutor was ordered to submit (i) a copy of the Letter to the Chamber, and (ii) the grounds and legal basis for the Prosecutor’s decision to omit the Letter from its disclosure to the Defence;

NOTING the “Prosecution’s observations on the Defence Request for Disclosure ICC-01/04-01/10-227”⁴ filed on 22 June 2011, wherein the Prosecutor (i) submitted the Letter to the Chamber, (ii) reiterated its objection to the disclosure of the Letter to the Defence on the grounds that disclosure of a state’s confidential communication is inappropriate and that the Letter is not material to the preparation of the Defence’s admissibility and jurisdiction challenge and (iii) requested that the Chamber reject the Defence Request or, if it finds that the Letter contains information relevant to the Defence, to allow the Prosecutor to

¹ ICC-01/04-583.

² ICC-01/04-01/10-227.

³ ICC-01/04-01/10-236.

⁴ ICC-01/04-01/10-245.

summarise the relevant information in lieu of disclosing the Letter itself to the Defence;

NOTING the “Defence reply to Prosecution filing: ICC-01/04-01/10-245”⁵ filed on 28 June 2011, whereby the Defence submitted that the Prosecutor failed to identify any legal basis for the non-disclosure of the Letter other than the claim of confidentiality made by the Government of the DRC in response to the enquiry of the Prosecutor as to whether it would agree to disclose the Letter to the Defence;

CONSIDERING that, on the face of the Letter, there does not appear to be any indication to the effect that it should be treated as confidential;

CONSIDERING the Prosecutor’s submission that, when he sought the consent of the Government of the DRC to the disclosure of correspondence preceding the referral of the situation in the DRC to the Court, the Government refused disclosure of the Letter “on the ground that it was a confidential communication not intended for disclosure to third parties”⁶;

CONSIDERING that the Prosecutor has clarified that his opposition to disclosure of the Letter to the Defence is based on his understanding that “diplomatic correspondence – though perhaps not privileged per se -- is intended to be confidential” and that “the Chamber should not breach this confidentiality without [...] a clearly established need for disclosure”⁷;

CONSIDERING that the Prosecutor has failed to identify a valid legal basis to withhold information which the Defence believes to be material to the defence of Mr. Mbarushimana;

⁵ ICC-01/04-01/10-253.

⁶ ICC-01/04-01/10-245.

⁷ Ibid, at para. 11.

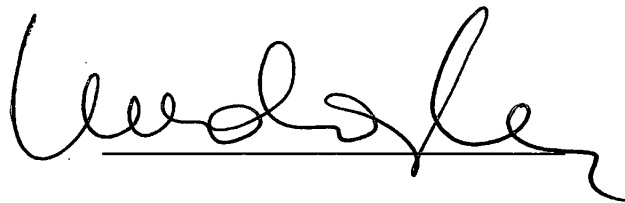
RECALLING the obligations of the parties with regard to the preservation of the confidentiality of material of a non-public nature as set out in the Chamber's decision of 29 June 2011⁸;

FOR THESE REASONS

GRANT the Defence request for disclosure, and

ORDER the Prosecutor to disclose the Letter to the Defence by Monday, 11 July 2011.

Done in English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', written over a horizontal line.

Judge Cuno Tarfusser

Single Judge

Dated this Friday, 8 July 2011

At The Hague, The Netherlands

⁸ ICC-01/04-01/10-258.